

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

Senator John McCain

MURs 5712 and 5799

GENERAL COUNSEL'S REPORT # 2

I. ACTIONS RECOMMENDED

(1) Find probable cause to believe that Senator John McCain violated 2 U.S.C. § 441i(e)(1) and 11 C.F.R. § 300.62 by soliciting non-federal funds; and (2) approve the attached conciliation agreement.

II. BACKGROUND

These matters concern the activities of Senator John McCain in connection with fundraising events held on behalf of candidates for state office. In each matter, Senator McCain, through his agents Straight Talk America PAC and Craig Goldman, consented to appear in fundraising solicitations for state candidates seeking funds in excess of the contribution limits and source prohibitions of the Federal Election Campaign Act of 1971, as amended (the "Act"). On February 21, 2007, the Commission in MUR 5712 found reason to believe that Senator John McCain violated 2 U.S.C. § 441i(e) and 11 C.F.R. § 300.62 by soliciting non-Federal funds in connection with a fundraising event on behalf of Governor Arnold Schwarzenegger and the California Republican Party and authorized conciliation prior to a finding of probable cause to believe. On April 10, 2007, the Commission in MUR 5799 found reason to believe that Senator McCain also violated 2 U.S.C. § 441i(e) and 11 C.F.R. § 300.62 by soliciting non-Federal funds on behalf of South Carolina Adjutant General Stan Spears and authorized conciliation prior to a finding of probable cause to believe.

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2 _____ we served the General Counsel's Brief ("GC Brief"), which is incorporated herein
3 by reference. See GC Brief. The GC Brief sets forth the factual and legal upon which we are
4 prepared to recommend that the Commission find probable cause to believe that Senator McCain
5 violated 2 U.S.C. § 441i(e) and 11 C.F.R. § 300.62.

6 In response to the GC Brief, Senator McCain maintains that he fully complied with the
7 law regarding the appearance of Federal candidates and officeholders and state candidate
8 fundraising events and, for the first time, argues that neither he nor anyone authorized to act on
9 his behalf, approved the use of his name and image in the fundraising solicitations. See
10 Response Brief of Senator John McCain (Sept. 20, 2007) ("McCain Response"). Senator
11 McCain also requested a Probable Cause Hearing before the Commission under the Probable
12 Cause Hearing pilot program. The Commission held a probable cause hearing in this matter on
13 October 24, 2007. See Transcript of October 24, 2007 Probable Cause Hearing ("McCain
14 Hearing").

15 For the reasons set forth in the General Counsel's Brief and discussed below, we
16 recommend that the Commission find probable cause to believe that Senator John McCain
17 violated 2 U.S.C. § 441i(e)(1)(B) and 11 C.F.R. § 300.62, and approve the attached conciliation
18 agreement.

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III. FACTUAL AND LEGAL ANALYSIS

**A. THE FUNDRAISING INVITATIONS CONSTITUTE SOLICITATIONS
BY SENATOR McCAIN FOR FUNDS IN EXCESS OF THE ACT'S
CONTRIBUTION LIMITS AND SOURCE PROHIBITIONS**

Senator McCain maintains that he did not violate Section 441i(e)(1)(B) because, given the presence of a disclaimer stating that he was not soliciting funds contrary to Federal restriction, the solicitations for non-Federal funds were not solicitations made by him. See McCain Response, at 6-11. According to Senator McCain, AO 2003-03 ("*Cantor*") and AO 2003-36 ("*RG4*") stand for the proposition that Federal candidates and officeholders may appear in solicitations for funds in excess of the Act's contribution limits and source prohibitions so long as the solicitations include a disclaimer limiting the solicitation by the Federal officeholder or candidate to Federally permissible funds. See *id.*, at 7-10. To support this reading, he refers to the response to question 2 in the *RG4* Advisory Opinion, where the Commission, in response to a question asking if a Federal officeholder or candidate could appear in written solicitations for non-Federal funds without any disclaimer, stated:

No, the covered individual may not so participate under those circumstances. The requirements described above in response to questions 1.a, 1.b, and 1.c are applicable to the situations described in question 2, including the need for the notice that the covered individual is asking for funds only up to the applicable limits of the Act, and is not asking for funds outside the limitations or prohibitions of the Act.

McCain Response, at 8 (quoting *RG4* (Response to Question 2)). In addition, Senator McCain argued that his interpretation of the above-quoted language was widely understood throughout the regulated community, and provided a partial excerpt from a Republican National Committee Legal Compliance Seminar to bolster his claim. See McCain Hearing, at 16.

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1 The Commission has considered and rejected this interpretation of *Cantor* and *RGA* in
2 both enforcement matters involving Senator McCain, instead concluding that the entire
3 solicitation must be limited to Federal funds. Moreover, counsel misconstrues the Commission's
4 response to *RGA* question 2. The Commission did not permit the requested activity, and noted
5 that in order to comply with the statute, the *RGA* should look to the guidance set forth in
6 response to questions 1.a, 1.b, and 1.c. Those responses clearly set forth what a Federal
7 officeholder or candidate may or may not do with respect to appearing in solicitations for
8 fundraising events on behalf of non-Federal candidates. Specifically, in response to question 1.b,
9 the Commission stated that a Federal officeholder or candidate could not agree to appear in a
10 solicitation for non-Federal funds on behalf of a candidate for State office "regardless of the
11 appearance of such a disclaimer." AO 2003-36, at n.9. The Commission explained that if such
12 disclaimers were sufficient, a Federal officeholder or candidate would be able to solicit non-
13 Federal funds, but avoid liability simply by reciting a rote disclaimer. See *Cantor* (Response to
14 Question 1.b), *RGA* (Response to Question 1.a); see also AO 2003-37 (*ABC*), at 18.

15 Similarly, counsel's argument that the regulated community widely understood *Cantor*
16 and *RGA* to allow Federal candidates and officeholders to appear in solicitations of non-Federal
17 funds for State candidates is not persuasive. Counsel's citation to advice given at the Republican
18 National Committee's Legal Compliance Seminar is incomplete and does not address a Federal
19 candidate's solicitation for funds in excess of the Act's amount restrictions and source
20 prohibitions. McCain Hearing (PowerPoint Presentation, at 9). Further, counsel's broad
21 generalization about the regulated community's understanding of *Cantor* and *RGA* ignores
22 statements made immediately after the Advisory Opinions were issued concluding that the

1 presence of a disclaimer does not divorce the Federal officeholder or candidate from the
2 solicitation of non-Federal funds.¹

3 In short, the law therefore requires that a Federal officeholder or candidate for Federal
4 office who approves, authorizes, agrees, or consents to appear in a written solicitation in
5 connection with the election of a state candidate may not appear in the solicitation unless the
6 entire solicitation is expressly limited to Federally permissible funds regardless of whether there
7 is an express statement limiting the Federal officeholder or candidate's solicitation to funds that
8 comply with the amount limits and source prohibitions of the Act. Neither solicitation complied
9 with this requirement. The solicitation at issue in MUR 5712 sought donations in amounts that
10 exceeded the Federal contribution limits for individuals per election, and targeted corporations,
11 which are prohibited from making contributions under the Act. See 2 U.S.C. §§ 441a and 441b.
12 Similarly, in MUR 5799, the solicitation contained no language limiting the entire solicitation to
13 Federally permissible sources, and it advised recipients that "South Carolina state law allows
14 campaign contributions of up to \$3,500 per election cycle," implicitly seeking donations in
15 excess of the Federal contribution limit. It therefore violated BCRA's prohibitions on soliciting
16 non-Federal funds for Senator McCain's name or likeness to appear in both solicitations.

¹ The Campaign Legal Center, whose President and General Counsel represents Senator McCain in this matter, explains on its website that:

The Advisory Opinion also sets forth rules for RGA written solicitations of funds featuring Federal candidates and officeholders, among other things clarifying that RGA solicitation materials in which a Federal officeholder or candidate has authorized his or her appearance may not ask for donations from Federally impermissible sources or exceeding Federal amount limitations (e.g., the solicitation cannot ask for a \$50,000 contribution from individuals but then indicate that the Federal officeholder is only asking for \$5,000 donations from individuals).

See FEC Issues Advisory Opinion 2003-36 on Fundraising for RGA (available at <http://www.campaignlegalcenter.org/FEC-129.html> (Jan. 12, 2004)); see also The Republican Governors' Opinion: More on What Candidates Can, or Cannot, Do with "527s" (available at <http://www.moreofmoneyhardlaw.com/moreofmoneyhardlaw/updates> (Jan. 13, 2004)).

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**B. SENATOR McCAIN APPROVED, AUTHORIZED, AGREED, OR
CONSENTED TO APPEAR IN THE SOLICITATIONS THROUGH HIS
AGENT**

Senator McCain, through Straight Talk America PAC's actions to coordinate his appearance at State candidate fundraising events, consented to appear in solicitations for non-Federal funds. Although Senator McCain argues that Straight Talk America PAC was not his agent, the facts clearly establish the opposite.

**1. Straight Talk America PAC and Craig Goldman Arranged for
Senator McCain to Appear at State Candidate Fundraising Events**

Straight Talk America PAC was established as Senator McCain's Leadership PAC in 2000. *See McCain Hearing*, at 11. According to Senator McCain, the PAC dissolved in 2003 because of questions regarding the relationship between the PAC and Senator McCain during his 2004 campaign for U.S. Senate. Straight Talk America PAC re-formed in 2005 in order to "help elect Republican candidates in the 2006 elections." McCain Response (Declaration of Senator John McCain (Sept. 18, 2007), at 1). Senator McCain served as its honorary chair and was the "face of the PAC for purposes of PAC appearances and PAC fundraising." McCain Hearing, at 11-12. Craig Goldman began serving as the PAC's Executive Director in August 2005.

Although Senator McCain attempts to distance himself from Mr. Goldman, he acknowledges that he was "generally aware that Mr. Goldman's responsibilities at the Straight Talk PAC included reviewing requests that I participate in political events to be paid for by the PAC, and serving as the liaison for the PAC with my staff and party committees and candidates in terms of scheduling such events." McCain Response (Declaration of Senator John McCain (Sept. 18, 2007), at 1). During the probable cause hearing, his counsel further explained that it was up to the Senator to determine which events he would attend and how and when he would

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1 travel to each event, and that Mr. Goldman made the actual arrangements for Senator McCain to
2 appear at each event. *See McCain Hearing*, at 26, 32-33.

3 Mr. Goldman described his activities in similar terms. With respect to the fundraising
4 event on behalf of Governor Schwarzenegger and the California Republican Party, Mr. Goldman
5 coordinated Senator McCain's appearance at the March 20, 2006 event, including informing the
6 Schwarzenegger campaign "that we would need to see a draft of any invitation before it was
7 sent." *See MUR 5712 Response (Affidavit of Craig Goldman (Sept. 19, 2006), at 1)*. Mr.
8 Goldman also averred that his responsibilities generally included "coordinat[ing] requests from
9 Republican candidates and party committees across the country for appearances by Senator
10 McCain" and, "[p]ursuant to our policy," reviewing draft invitations to ensure compliance with
11 Federal campaign finance law, including the Spears solicitation. *See MUR 5799 Response*
12 *(Affidavit of Craig Goldman (Sept. 21, 2006), at 1)*.

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15 **2. Straight Talk America PAC and Craig Goldman Had Actual**
16 **Authority to Perform as Senator McCain's Agent For the Purpose of**
17 **Approving the Use of His Name in Solicitations for State Candidate**
18 **Fundraising Events Featuring Senator McCain**

19 For the purpose of the Commission's BCRA regulations, an agent is defined as "any
20 person who has actual authority, either express or implied, . . . to solicit, receive, direct, transfer,
21 or spend funds in connection with an election" on behalf of a candidate for Federal office.
22 11 C.F.R. § 300.2(b). It is therefore unnecessary for a principal to have explicitly told his or her
23 agent to perform a specific function on his or her behalf. Rather, actual authority may be

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1 established in many different ways. *See* Definitions of "Agent" for BCRA Regulations, 71 Fed.
2 Reg. 4975, 4978 (Jan. 31, 2006). For example,

3 Apparent authority is not necessary to capture impermissible activities by persons
4 holding certain titles or positions within a campaign organization, political party
5 committee, or other political committee. A title or position is most frequently part
6 of the grant of actual authority, either express or implied.

7 *Id.* The Commission stated that because a title or position creates an implied scope of authority,
8 the Federal officeholder or candidate could be found liable for his or her agent's actions,
9 provided they are within the scope of authority, even if the Federal officeholder or candidate
10 instructed the agent not to perform the task. *See id.* In addition, "[a]cquiescence by the principal
11 in conduct of an agent whose previously conferred authorization reasonably might include it,
12 indicates that the conduct was authorized." *Id.* at 4979 (quoting Restatement (Agency) § 43).

13 Mr. Goldman and Straight Talk America had actual authority to approve the use of
14 Senator McCain's name in solicitations for fundraising events at which he agreed to appear.
15 Counsel for Senator McCain previously stated that Craig Goldman "served as Senator McCain's
16 agent in accepting an invitation from the Schwarzenegger campaign and the California
17 Republican Party" to speak at a fundraising event. MUR 5712, Ltr. from T. Potter to A.
18 Terzaken (Sept. 20, 2006), at 1; MUR 5799 Response, at 1 ("Senator McCain and his agents had
19 no role in planning the event or designing the format of the invitation").² Moreover, Senator
20 McCain knew that Mr. Goldman was the Executive Director of Straight Talk America PAC and,

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1 in that role, reviewed requests that he participate in fundraising events and served as the liaison
2 between the PAC, Senator McCain's staff, and party committees and candidates for the purpose
3 of scheduling the events. See McCain Response (Declaration of Senator John McCain (Sept. 18,
4 2007), at 1).

5 By permitting Straight Talk America PAC to coordinate and make arrangements for his
6 appearance at fundraising events, Senator McCain authorized Straight Talk America PAC and,
7 by virtue of his position as Executive Director, Mr. Goldman, to act as his agent to perform the
8 tasks to arrange for his appearance at these events. See 71 Fed. Reg. 4975, 4978-79; Restatement
9 (Agency) § 43. Clearly Mr. Goldman understood that coordinating Senator McCain's
10 appearances at fundraising events included reviewing invitations to the events. As set forth in his
11 affidavit, Mr. Goldman stated that one of his responsibilities was "to coordinate requests from
12 Republican candidates and party committees across the country for appearances by Senator
13 McCain" and that "[p]ursuant to our policy, I would need to see a draft of any invitation before it
14 was sent, to ensure that it complied with all federal rules and regulations." MUR 5799 Response
15 (Affidavit of Craig Goldman (Sept. 21, 2006), at 1). In describing the purpose for his review,
16 Mr. Goldman stated that "I exercised my best efforts to obtain and follow legal advice on behalf
17 of Senator McCain." Affidavit of Craig Goldman (June 11, 2007).

18 Despite these prior statements and representations, Senator McCain now argues that Mr.
19 Goldman was a rogue actor without authority to act on his behalf. The facts submitted as
20 purported support, however, are not persuasive. Mr. Goldman states that to his knowledge,
21 Senator McCain "never authorized the use of his name on the invitations, or was aware of or
22 approved any of the language on the invitations." McCain Response (Supplemental Declaration

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of Craig Goldman (Sept. 19, 2007)). Mr. Goldman does not, however, contradict previous statements that Senator McCain authorized him to act as Senator McCain's agent generally for the purpose of coordinating his appearance at fundraising events. Similarly, Senator McCain states that "Mr. Goldman was not authorized by me to approve any mailings in which my name or image was used to solicit non federal funds" and "at no time did I ever authorize Mr. Goldman to act as my agent or to speak or act in my stead." McCain Response (Declaration of Senator McCain (Sept. 18, 2007), at 1-2). As stated previously, it is not necessary that Senator McCain explicitly authorize Mr. Goldman to perform specific functions on his behalf. 71 Fed. Reg. 4975, 4978-79. By authorizing Straight Talk America PAC, and its then-Executive Director, to accept and schedule his appearance at State candidate fundraising events, he implicitly authorized the Leadership PAC to perform the tasks necessary to enable his appearance at these events, which included, among other things, the review and approval of invitations to the fundraising events.

3. The Relationship Between Senator McCain's Leadership PAC and His Authorized Campaign Committee is Not Relevant to the Analysis of Whether Senator McCain Consented to the Use of His Name in Solicitations for Candidates for State Office

Senator McCain's argument that the activities of a Leadership PAC cannot be imputed to the sponsoring Member of Congress is incorrect as a matter of law. According to Senator McCain, Section 441i(e) applies only to Federal officeholders and candidates, their agents, and entities established, financed, maintained, or controlled by, or acting on behalf of, a Federal officeholder or candidate. Because Straight Talk America PAC is a leadership PAC, and Commission regulations state that "no authorized committee shall be deemed affiliated with any entity that is not an authorized committee," 11 C.F.R. § 100.5(g)(5), Senator McCain argues that Straight Talk America PAC could not have served as his agent.

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1 Counsel for Senator McCain appears to be misconstruing the meaning of Section
2 100.5(g)(5). By modifying the definition of "affiliated committees" such that "no authorized
3 committee shall be deemed affiliated with any entity that is not an authorized committee," the
4 regulation allows Members of Congress to create Leadership PACs and raise and spend money
5 separately and distinctly from their authorized campaign committee, but prohibits Federally
6 impermissible funds from flowing to the authorized committee of the sponsor of the Leadership
7 PAC. *See* Leadership PACs, 68 Fed. Reg. 67,013 (Dec. 1, 2003).

8 In the Explanation and Justification, the Commission stated that it took this approach and
9 chose to apply an in-kind contribution analysis to the interaction between an authorized
10 committee and a Leadership PAC because it determined that it was more appropriate to analyze
11 whether the amount of the contribution from a Leadership PAC was permissible, and not whether
12 or not the Leadership PAC and the recipient committee were affiliated and thus shared a single
13 contribution limit. According to the Commission, this understanding flows from the statutory
14 structure of BCRA, which "contemplates Federal candidate control of unauthorized committees."
15 *Id.* at 67,016. Nowhere in the Explanation and Justification, or in the regulation itself, did the
16 Commission create a *per se* rule that a Leadership PAC cannot act as the agent of its sponsoring
17 candidate or officeholder.

18 Given the Explanation and Justification, counsel's argument that 11 C.F.R. § 100.5(g)(5)
19 insulates Senator McCain from liability is not relevant to either matter. *See* McCain Hearing, pp.
20 26-33. These matters concern the use of Senator McCain's name in fundraising events for State
21 candidates. It does not concern the size of any contribution of funds by Straight Talk America
22 PAC to other political committees. Contrary to Senator McCain's argument, the Explanation and

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Justification assumes a connection between a candidate's authorized committee and their Leadership PAC, but allows for separate contribution limits to permit the Member of Congress to assist other candidates for Federal, State, and local office. Removing the connection between the candidate and his or her Leadership PAC would make the Leadership PAC designation meaningless. See McCain Hearing, at 31, 73-74.

4. Conclusion

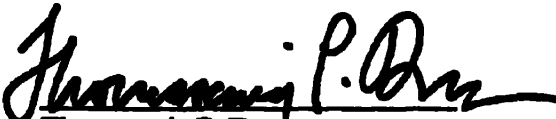
Given that the solicitations at issue in these matters were not entirely limited to Federally permissible funds, and that Straight Talk America PAC and Craig Goldman were Senator McCain's agents for purposes of approving the solicitations, we recommend that the Commission find probable cause to believe that Senator McCain violated 2 U.S.C. § 441i(e)(1)(B) and 11 C.F.R. § 300.62 in MURs 5712 and 5799.


IV. CONCILIATION

V. **RECOMMENDATIONS**

1. Find probable cause to believe that Senator John McCain violated 2 U.S.C. § 441i(e)(1)(B) and 11 C.F.R. § 300.62;
2. Approve the attached conciliation agreement; and
3. Approve the appropriate letter.

12/11/2007
Date


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